No. 16428

IN THE

# United States
# Court of Appeals
## For the Ninth Circuit

WILLIAM CHARLES LUCAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

## APPELLEE'S BRIEF

JACK D. H. HAYS
*United States Attorney*
*For the District of Arizona*

MICHAEL A. LACAGNINA
*Assistant United States Attorney*

412 U. S. Post Office and
Court House Building
Tucson, Arizona
*Attorneys for Appellee*

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### JURISDICTIONAL STATEMENT

This is an appeal from an Order of the United States District Court for the District of Arizona entered on the 5th day of December, 1958 denying Appellant's Motion to Vacate and Set Aside an Illegal Sentence. The jurisdiction of the District Court was based upon Section 2255 of Title 28, United States Code. This Court has juridiction to entertain this appeal and to review the judgment in question, under provisions of Section 2253 of Title 28 United States Code and Section 1291, Title 28, United States Code.

### STATEMENT OF FACTS

Appellant was tried by a jury in the United States District Court for the District of Arizona at Tucson, Arizona on June 21, 1957 and found guilty. Appellant was tried pursuant to

charges made by the grand jury in an indictment returned May 14, 1957 accusing him of transporting a stolen motor vehicle from Los Angeles, California to Globe, Arizona. On June 24, 1957 Appellant was sentenced to 5 years.

Appellant filed a Motion purrsuant to 28 U.S.C. 2255 alleging that he was not adequately represented by a Court appointed counsel.

On December 5, 1958 a hearing on Appelant's Motion was held in Tucson, Arizona before Honorable James A. Walsh. The Government introduced testimony from Mary Anne Reimann, Assistant United States Attorney for the District of Arizona, and John Collins, Esquire, Appellant's Court-appointed attorney. Appellant testified in his own behalf.

The trial court denied Appellant's Motion and made Findings of Fact and Conclusions of Law. This is an appeal from that ruling.

## SUMMARY OF ARGUMENT

1. Appellee contends that Appellant was adequately represented by counsel before, after and during his trial.

2. Appellee contends that the Appellant does not have an unqualified right to subpoena all of the files of the Federal Bureau of Investigation regarding his case. This issue was not presented to the Court at the time of the hearing and since it appears here for the first time the Court should disregard it.

3. The Court made Findings of Fact and Conclusions of Law based on the evidence produced at Appellant's hearing and said Findings of Fact were supported by the evidence produced.

## I.

## APPELLANT WAS ADEQUATELY REPRESENTED BY COUNSEL

The Court appointed John Collins, Esquire, a member of the State of Arizona Bar and admitted to practice before the United

States District Court, to represent Appellant during his trial. Page 33, Record on Appeal, Volume 2, Lines 6-8.

Mr. Collins testified at the hearing held December 5, 1958 on Appellant's Motion to Vacate Sentence, pursuant to 28 U.S.C. 2255. Regarding Appellant's main contention that a witness called for the defense was not allowed to testify, Mr. Collins' testimony was as follows:

> "Q. What did you advise him at that time?
>
> "A. I asked Mr. Lucas in view of what she had stated to me was it his request I call her as a witness anyway, and he said no, he did not wish for me to call her."
>
> Record on Appeal, Volume 2, page 34, lines 15 - 18.

As it appears, it was Appellant's desire not to put the witness Pearl Hallam on the stand.

To substantiate Mr. Collin's testimony, Appellant said on cross-examination in the same hearing while reading from a letter he had written while serving his sentence at Leavenworth:

> "Q. (By Mr. Lacagnina) I'd like you to look at Government's Exhibit 1 and read where you have written No. 2 through paragraph two. Read it out loud, please.
>
> "A. That I did not place Mrs. Hallam, the mother of Mrs. Calton, on the stand because of her badly strained mental condition at the time, and because of her plea not to do so. I hold too great an admiration for her to subject her to any kind of strain or hurt even though it was to my detriment. She was the only person who was able to prove and discredit some of her daughter's testimony. Possibly you can see my position in this as I believe any person with any consideration for the honor of another would have acted and not called Mrs. Hallam as a witness as in my case." Record on Appeal, Volume 2, pages 22-23, lines 16-25, 1-3.

Appellant did not desire Pearl Hallam to testify because she would only substantiate the Government's case.

> "Q. Did your attorney tell you why she wasn't called to the stand?
>
> "A. Yes.
>
> "Q. Why?
>
> "A He said that what short talk he had with her, that it was his feeling she would break down on the stand and that regardless of what had happened, she had told him that she wouldn't say anything opposite to her daughter's testimony."

Record on Appeal, Volume 2, page 8, lines 3-11.

The Court, after hearing the evidence produced at the hearing on December 5, 1958 made the following Finding of Fact regarding this particular issue:

> "With regard to the issue of Pearl Hallam and whether or not counsel failed to properly represent the defendant by not putting her on the witness stand, I find that Pearl Hallam didn't get on the wintess stand because she advised counsel and counsel advised the defendant that if she did testify, her testimony would be adverse to the defendant, and on that basis she wasn't called and the defendant knew it and was in agreement with it and didn't insist she testify. This letter to the Court indicates, or attempts to indicate, he didn't call her out of the spirit of magnanimity. He would rather suffer defeat in his suit than call this woman on account of her mental condition. His story now is completely opposed to what he wrote me shortly after he was sent to the penitentiary."

Record on Appeal, Volume 2, page 46, lines 7-20.

The Honorable James A. Walsh also found the following from the testimony offered at Appellant's hearing regarding Appellant's failure to take the stand:

> "As to his failure to get on the stand himself, I find that happened because he was advised if he got on the witness stand his record would be competent evidence against him of his previous convictions, and then he accepted his counsel's statement or advice he wouldn't call him unless he insisted on getting on."
>
> Record on Appeal, Volume 2, page 46, lines 21-25, page 47, line 1.
>
> To the same effect, see U. S. vs. Sumpter, 111 Fed. Sup. 507 at 511.228 Fed. 2d 290, affirmed.

The record does not bear out Appellant's claim that the trial tactics of his counsel were such as to render his aid ineffective. Offutt v. U.S., 242 F. 2d 373.

In the case of U. S. v. Miller, 254 F 2d 523, the Court dealing with the same issue said,

> "Finally, the claim that his attorney was inefficient was of no avail on a Motion under 2255 unless counsel's failure was such as to make the trial a mockery of justice. U. S. v. Wight, 176 F. 2d 376."

In the Wight case cited above, the Court sets down the test to be applied when deciding whether or not Appellant was represented by competent counsel.

> "The proof of the efficiency of such assistance lies in the character of the resulting proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegation of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the use of a writ of habeas corpus or the granting of a petition pursuant to 28 U.S.C. 2255."

The record clearly shows that Appellant was well represented and after hearing the evidence produced at Appellant's hearing on his Motion the Court concluded:

> "There is nothing there that made counsel's representation incompetent or less than it should have been."
> Record on Appeal, Volume 2, page 47, lines 1-2.

Appellant received a fair and impartial trial. Appellant was represented by competent counsel and the Court properly denied his Motion to Vacate his Sentence.

> "Unsuccessful litigants usually blame their counsel." Ford v. U. S., 234 F. 2d 835, certiorari denied 77 Sup Ct. 364. 352 U. S. 972, 1 L.Ed. (2) 325.

II

APPELLANT DOES NOT HAVE THE UNQUALIFIED RIGHT TO INSPECT FILES OF THE FEDERAL BUREAU OF INVESTIGATION.

Counsel for the Appellant subpoenaed all documents relative to and concerning this case by serving on an agent of the Federal Bureau of Investigation residing in Tucson a subpoena duces tecum.

Appellant does not have the unqualified right to *all* the records and files of the Federal Bureau of Investigation. The Jencks Statute, 18 U.S.C. 3500, provides that no statement or report of a government witness shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination. Futhermore, they must be in the possession of the government and must relate to the subject matter as to which the witness has testified.

The Jencks Statute was passed subsequent to the Jencks case cited by Appellant on page 12 of his brief, 353 U.S. 657, 77 Sup. Ct. 1007, and 1 L.Ed. (2) 1103.

In the present case, Appellant, at page 11 of his brief, sets out

the questions asked by him of the Agent of the Federal Bureau of Investigation. It is noteworthy to mention that in his questions, Appellant never asks the witness whether any documents were in existence, what the documents contained if they were in existence, and whether or not they are in this Agent's possession. These were the questions which were necessary in order for the Court to decide whether or not they should be produced for examination by Appellant. The Agent properly cited Department Order No. 3229, revised, and published in Federal Register. Record on Appeal, Volume 2, page 41, lines 15 - 18, and stated at page 42, line 22 Record on Appeal, Volume 2, that there were no records in Tucson concerning this particular case.

Appellee would like to draw the Court's attention to the fact that at no place in the Transcript of Proceedings of December 5, 1958, Volume 2 of the Record on Appeal, did counsel for Appellant object to the non-production by the Agent of all the files of the Federal Bureau of Investigation, nor did he ask the Court for a ruling on the non-production of the Federal Bureau of Investigation's files. In fact, to this day, no one knows just what Appellant wanted or for what purpose.

Appellant's Argument, designated as Argument No. 2 on page 4 of his brief, is an issue being raised here for the first time and this Court should not give it any consideration.

In the case of U.S. vs. Shelton, 7th Cir., 249 Cir., 249 F. 2d 871 at page 875, the Court said,

> "Aside from the fact that this issue was not raised upon the petition in the Trial Court, but has been injected into the cause only on appeal, a situation not justifying us in giving it any consideration * * *. Walker v. U.S. 7th Cir. 218 F. 2d 80; Stearn vs. U.S. 4th Cir., 219 F. 2d 265."

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## CONCLUSION

There was sufficient evidence presented by both parties at the hearing held pursuant to 28 U.S.C. 2255 on Appellant's Motion to warrant the Honorable James A. Walsh's Findings of Fact and Conclusions of Law, and Appellee respectfully requests that this Court affirm the ruling made by the Trial Court.

Respectfully submitted,

Jack D. H. Hays
United States Attorney
For the District of Arizona

Michael A. Lacagnina
Assistant United State Attorney

Attorneys for Appellee